

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP—Continued

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
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Section 2.0	Control of NO _x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries.	11/11/09	6/4/10 75 FR 31711	New regulation.
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[FR Doc. 2011-10428 Filed 4-29-11; 8:45 am]
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[GC Docket No. 10-43; FCC 11-11]

Commission’s Ex Parte Rules and Other Procedural Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission revises certain *ex parte* and organizational rules. This document amends and reforms the Commission’s rules on *ex parte* presentations made in the course of Commission rulemakings and other permit-but-disclose proceedings. It also adopts a new rule requiring all oral *ex parte* communications to be documented, and their contents described. This reform should enable those participating in our proceedings as well as those observing them to better identify and understand the issues being debated before the Commission. New electronic filing rules will empower anyone using the Internet to access this information, and stronger enforcement provisions will bolster these new requirements. Given the complexity of the issues we must decide and the far-reaching impact our decisions often have, we believe these initiatives to increase transparency serve the best interests of the Commission, the entities we regulate, and the public we serve.

DATES: Effective June 1, 2011, except for the amendments to §§ 1.1206(b) and 1.1208, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those rules.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW.,

Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Leslie F. Smith, Federal Communications Commission, Room 1-C216, 445 12th Street, SW, Washington, DC 20554, or send an e-mail to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Joel Kaufman, Chief, Administrative Law Division, Office of General Counsel, 202-418-1758 or joel.kaufman@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Leslie F. Smith, (202) 418-0217, or send an e-mail to PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: In this Report and Order adopted on February 1, 2011, and released on February 2, 2011, the Commission amends certain *ex parte* rules and other procedural rules, 47 CFR parts 1 and 0. Part 1 outlines a number of rules regarding “presentations” by outside parties to the Commission. Section 1.1202(a) of the Commission’s rules defines a “presentation” as a communication directed to the merits or outcome of a proceeding. 47 CFR 1.1202(a). An oral presentation is *ex parte* when it is made without advance notice to other parties to a proceeding and without the opportunity for them to be present. *See* 47 CFR 1.1202(b). For purposes of the *ex parte* rules, Commission proceedings are divided into three categories: those in which there is no restriction on *ex parte* presentations (“exempt” proceedings); those in which *ex parte* presentations are prohibited (“restricted” proceedings); and those in which *ex parte* presentations are permitted subject to disclosure (“permit-but-disclose” proceedings). *See* 47 CFR 1.1204, 1.1206, 1.1208. The various categories of “permit-but-disclose” proceedings are enumerated in sections 1.1206(a)(1) through (14) of the rules, and include informal rulemaking and declaratory ruling proceedings.

On March 25, 2010, the Commission released a notice of proposed rulemaking seeking comment on a number of proposed changes to the Commission’s *ex parte* rules. *See Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, 25 FCC Rcd 2403 (2010) (*NPRM*). By this Report and Order, we adopt final rules effecting a number of proposals described in the *Notice*. By a Further Notice of Proposed Rulemaking, published elsewhere in the **Federal Register**, we seek comment on the adoption of real party-in-interest disclosure rules. The following paragraphs describe the final rules adopted by the Commission.

Filing and Content Requirements

1. Ex Parte Presentations for Which Ex Parte Notices Must Be Filed

Section 1.1206(b)(2) of our rules requires that a notice of an oral *ex parte* presentation must be filed only if new data or arguments not already reflected in the party’s written comments, memoranda or other filings in that proceeding are discussed. 47 CFR 1.1206(b)(2). In the *NPRM*, we suggested that this reduces the adequacy of the record on which Commission decisions are based and deprives parties and the public of a fair opportunity to respond. *See* 25 FCC Rcd at 2406. We therefore proposed to require the filing of *ex parte* notices for every oral *ex parte* presentation, whether or not it contains new data or arguments. To the extent that the presentation merely reiterates data and arguments already contained in the written comments filed by the presenter, the filing would either include a summary of this information or provide specific references, including paragraph or page numbers, to the presenter’s prior filings containing the data and arguments presented.

As an initial matter, we determine that *ex parte* presentations can give the Commissioners and staff valuable new information on the often highly complex and technical legal, economic, and engineering issues that we must consider in reaching our decisions. Prohibiting *ex parte* contacts outright, or

limiting them in time and scope, could adversely affect our ability to respond to new issues as they arise in the course of a proceeding. Limiting oral *ex parte* presentations to material already in the record would result in mere redundancy, prevent the Commission from obtaining information it needs as efficiently as possible, and provide inadequate assurance that an undisclosed *ex parte* presentation had not been made. We also find that recording all oral *ex parte* contacts and making them available online would be impractical compared with posting more complete and comprehensive written summaries online. For these reasons, we determine that oral *ex parte* presentations on the issues raised in permit-but-disclose proceedings should continue to be allowed and should not be limited by the alternatives commenters in the proceeding suggested.

In the Report and Order, we adopt the proposal set forth in the *NPRM* and require the filing of notices for all oral *ex parte* presentations made in permit-but-disclose proceedings, regardless of whether they involve new data or arguments or simply reiterate what the party has already submitted in the written record of the proceeding. Transparency requires that interested parties, and the public, know that *ex parte* meetings are taking place, no matter whether old or new information is being discussed. This proposal will better assure procedural fairness to parties participating in a proceeding, especially those with limited resources. Just as important, this rule change will increase the public's ability to follow the course of Commission proceedings, thereby facilitating the public's ability to express opinions on pending matters either by submitting written comments or by joining the informal discussion of issues on the Commission's new electronic media platforms. This, in turn, should increase public confidence in the integrity of Commission decisions. (We note that this proposal will not prove burdensome insofar as most parties already file at least a pro forma notice after making an oral *ex parte* presentation.)

2. Content of Notices

Summary or Citation Required. The Report and Order next describes what information *ex parte* notices should contain. First, we find that it would not impose a significant burden on any party, or cause undue delays in filing, to require that a party reiterating data or arguments in its written submissions either summarize the information presented *ex parte* or include a citation

to the pages or paragraphs of its own prior filings where the information can be found. Any incremental effort a party expends in providing brief summaries or citations to what it has itself written is minimal, and more than outweighed by the degree to which this requirement will facilitate the ability of everyone else involved—the Commission, staff, other parties, and the public—to understand how the issues in permit-but-disclose proceedings are being developed and refined. We therefore require parties making *ex parte* presentations that reiterate arguments previously made on the record to provide either a brief summary of the argument or a citation to either the page or the paragraph in the written material where the argument can be found. As our rules currently provide, when an *ex parte* presentation involves a discussion of new information or arguments, the notice must summarize the new arguments and data. Summaries must be sufficiently detailed that they would inform a person who did not attend the presentation of the facts that were discussed, the arguments made, and the support offered for those arguments.

List of Participating Parties Required. Currently, section 1.1206(b)(2) of the Commission's rules does not require that notices of *ex parte* presentations include a list of everyone attending or otherwise participating in an *ex parte* meeting. Many parties already include a list of attendees in their *ex parte* notices, and we find that requiring all parties to include such a list would not materially increase the burden of preparing *ex parte* notices. We determine that listing the names of all persons attending an *ex parte* presentation would significantly improve the transparency of the Commission's decision-making processes, and that other parties and the public are entitled to know who is attending or otherwise participating in meetings with decision-makers when an issue is being presented *ex parte*. We therefore amend our rules to incorporate a requirement that notices of *ex parte* presentations include a complete list of every person participating in the meeting.

We do not impose further requirements concerning the content of *ex parte* notices at this time. In particular, we do not find it necessary to require that parties list of all their prior *ex parte* filings in a given proceeding. The Electronic Comment Filing System (ECFS) now makes it simple to find which parties have made oral *ex parte* presentations in a given proceeding and how often they have made them, rendering this proposal an

unnecessary burden that would not materially increase the transparency of our proceedings.

Exemptions

1. Sunshine Exemption

Section 1.1203(a) prohibits all presentations to decision-makers, whether *ex parte* or not, during the Sunshine period on matters listed on a Sunshine Agenda unless an exemption applies. (A Sunshine Agenda or Sunshine notice is typically released seven days before a Commission meeting and lists the items that will be presented to the Commission. The period between the release of the Sunshine Agenda and the Commission meeting is intended to provide decision-makers a "period of repose" during which they can consider the upcoming items free from outside interruptions. See *Amendment of Part H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3020 (1987).) This prohibition currently applies from the time a Sunshine notice is issued until the Commission releases a text of the decision or order relating to the matter, issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or issues a public notice stating that the matter has been returned to the staff for further consideration. See 47 CFR 1.1203(b)(1)–(3). This prohibition is subject to an exemption for *ex parte* presentations requested by, or made with the advance approval of, the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement pursuant to section 1.1204(a)(10). See 47 CFR 1.1203(a)(1), 1.1204(a)(10). (A party making an oral *ex parte* communication during the Sunshine period pursuant to this exemption is required to file an *ex parte* notice pursuant to section 1.1204(a)(10)(iv), 47 CFR 1.1204(a)(10)(iv).)

In the *NPRM*, we asked whether permitting *ex parte* presentations under any circumstances during the Sunshine period is compatible with the "period of repose" for internal deliberation the Sunshine period is intended to provide and, if so, whether the current exemption should be narrowed. In the event some type of exemption were found to serve the public interest, we also asked whether the Sunshine period prohibition should begin at midnight following the release of the Sunshine notice.

In the Report and Order, we determine that the current rules

allowing the solicitation of *ex parte* presentations during the Sunshine period (either by the Commission or staff or with the advance approval of the Commission or staff) serves the public interest. As a practical matter, important issues can arise late in the deliberative process, and efficient decision-making requires that staff and Commissioners be permitted to gather the information needed to resolve them. As the issues the Commission considers become more numerous and complex, it is essential that the Commission have the ability to test its assumptions and conclusions, and that the information and arguments the Commission relies on in reaching its decisions are clear, compelling, and timely. Allowing the solicitation of *ex parte* presentations during the Sunshine period serves those needs, and we therefore retain the exemption in sections 1.1203(a)(1) and 1.1204(a)(10).

We find in the Report and Order that fairness and transparency in these situations are protected by the requirement that all *ex parte* presentations solicited during the Sunshine period are subject to the same disclosure rules that apply whenever an *ex parte* presentation is made. We also believe that fairness and the interest in a complete and accurate record suggest that other parties should have an opportunity to reply to *ex parte* presentations made during the Sunshine period, just as they would if the *ex parte* presentation were made at any other time. However, in the interests of administrative efficiency, we believe that *ex parte* contacts during the Sunshine period should be minimized and limited to information that is necessary to the impending decision. Similarly, any reply filed in response to a solicited *ex parte* presentation that occurs during the Sunshine period should be limited to the specific issues raised in the *ex parte* notice, including any new facts or data submitted. We thus determine that the Sunshine period will commence on the day (including business days, weekends, and holidays) following the release of the Sunshine notice. This approach will afford parties a sufficient opportunity to make submissions before the Sunshine period begins.

2. Status Inquiries

The NPRM also raised the issue of the exemption provided for inquiries on the status of permit-but-disclose proceedings. Section 1.1202(a) and the note to that section generally provide that inquiries related solely to the approximate time that action in a proceeding may be taken, without expressing a view on the merits or

outcome of the proceeding or the date by which it should be resolved, are not “presentations,” and are therefore exempt from the rules on *ex parte* presentations. See 47 CFR 1.1202(a). We requested comment on changes to this rule. In the Report and Order, we do not amend the rule, but we restate that if a staff member believes that an *ex parte* presentation has actually been made, and the presenter appears to believe the communication was only a status inquiry, the staff member should inform the party making the contact of the party’s obligation to file an *ex parte* notice.

3. Interagency Discussions

Section 1.1204(a)(5) exempts any presentation “to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction.” 47 CFR 1.1204(a)(5). Section 1.1204(a)(5) also requires the Commission to disclose factual information on issues of shared jurisdiction that is obtained *ex parte* from another Federal agency or agency staff member if the Commission relies on it in its decision-making process. Section 1.1204(a)(6) contains a similar provision regarding contacts between the Commission and the Department of Justice or Federal Trade Commission on telecommunications competition matters not designated for hearing. See 47 CFR 1.1204(a)(6). A note to these paragraphs specifies that such information will be relied on by the Commission and disclosure made only after advance coordination with the agency involved. If the other agency does not wish the information disclosed, the Commission will not disclose it and cannot rely on it in its decision-making process.

Several commenters suggested that we delete this exemption to the extent that it permits the National Telecommunications and Information Administration (NTIA) to discuss with the Commission issues concerning their shared responsibility over spectrum management. We do not adopt this proposal in the Report and Order. To require disclosure of all interagency *ex parte* contacts may not only affect another agency’s jurisdictional responsibilities, as the Note states, but could also adversely affect the Commission’s ability to render timely decisions based on the best information possible. We therefore believe that the current rules strike an appropriate balance between transparency and due process on the one hand and reasoned decision-making and administrative dispatch on the other.

Method of Filing

In the NPRM, we called attention to the fact that many *ex parte* notices now are filed electronically on ECFS. This allows Commission staff, parties, and the general public easy and timely access to these filings online. By contrast, when *ex parte* notices are filed in paper format, they can take several days to appear in ECFS. This delays the staff’s ability to analyze the contents of the presentation and limits outside parties’ ability to respond to it, particularly during the Sunshine period. We therefore proposed to require that *ex parte* notices be filed electronically in any proceeding in which electronic filing is available. We sought comment on whether these electronic filings should be required in a machine-readable format, such as Microsoft Word “.doc” format or non-copy protected text-searchable “.pdf” format for text filing, and “native formats” for non-text filings such as spreadsheets in Microsoft “.xml” format. We also recognized that electronic filing could be problematic where the party making the *ex parte* presentation does not have access to a computer or the Internet or the filing contains confidential business or financial information. We proposed specific language to codify the general requirement and exceptions, and sought comment on these issues. See 25 FCC Rcd at 2409–10.

1. *Electronic Filing Requirement.* In the Report and Order, we adopt the proposed rule requiring electronic filing. Consistent with the intent of section 1.1206(b)(2) and to assist Commissioners and decision-making staff, we modify section 1.1206(b)(2) to ensure that parties filing *ex parte* notices electronically also send copies to those Commissioners and staff who attended the meeting. We also adopt the requirement that electronic filings be made in a machine-readable format where feasible. This requirement parallels DC Circuit Court of Appeals Rule ECF–5, which requires electronically filed documents to be in machine-readable and text-searchable format. See Rule ECF–5(B), *May 15 Administrative Order*. We are not persuaded that the possibility of altering electronically filed documents is of sufficient concern to warrant departing from the same filing procedure that Federal courts use. As the court rules also provide, we will grant exceptions to the electronic filing requirement for parties unable to comply by reason of hardship. A party claiming a hardship exemption must state the basis for its claim in the notice.

2. *Confidential Information.* In recognition of concerns expressed by commenters about requiring the electronic filing of confidential information in *ex parte* notices, we permit parties to remove metadata containing confidential or privileged information, and we will not require parties to file electronically *ex parte* notices that contain confidential information. We will, however, require that a redacted version be filed electronically at the same time the paper filing is submitted, and that the redacted version be machine-readable whenever technically possible.

3. *Appendices and Attachments.* With particular regard to appendices and attachments, we require that as a general matter appendices and attachments to an electronically filed notice should also be filed in a machine-readable format, and that PDF images created by scanning a paper document may not be submitted, except in cases where a word-processing version of a document is not available. This approach tracks the rule for the U.S. Court of Appeals for the DC Circuit. We find that any incremental burden on the parties to prepare and submit redacted or scanned versions of certain material is outweighed by the efficiency of having these materials electronically accessible to the Commission, to other parties, and to the public.

At the same time, however, we are mindful of the fact that there will be instances in which appended material is voluminous or otherwise not practically filed in machine-readable format, and we believe carefully considered exceptions should be made in those cases. In considering such exceptions, we note that U.S. District Court for the District of Columbia Local Rule LCvR 5.4(e)(1)(A)–(C) provides that attachments exceeding 500 pages, or not in a format that readily permits electronic filing such as large maps, charts, videotapes, and similar material, or that are filed under seal, may be filed in paper form. We will consider waivers of the electronic filing requirement for appendices and attachments on a case-by-case basis, and will require parties seeking a waiver to claim it when the filing is made.

Filing Deadlines

In light of the added filing requirements proposed in the *NPRM*, we proposed to extend the deadline for filing notices of *ex parte* presentations from one to two business days for any presentation not made during the Sunshine period. However, in recognition of the need to assure procedural fairness for all parties during

the compressed seven-day Sunshine period, we also proposed a filing deadline of four hours for any *ex parte* presentation made during the Sunshine period.

In the Report and Order, we extend the filing deadline from one to two business days for *ex parte* presentations occurring outside the Sunshine period. We find that this extension is reasonably calibrated to the expanded filing requirements adopted elsewhere in the Report and Order. In addition, because we require the submission of most *ex parte* notices electronically, which should speed their public availability, the added day for filing should not materially affect the ability of the Commission and its staff, other parties, and the public to identify the issues raised by various parties. In the interests of clarity and uniformity, we use “business day” to denote the entire calendar day (*i.e.*, from 12 a.m. until 11:59:59 p.m.) for any day other than a weekend or holiday, and further specify that the governing time zone will be Eastern Time. Thus, for example, if an *ex parte* presentation occurs on a Tuesday, the *ex parte* notice must be filed no later than 11:59:59 p.m. on the following Thursday, assuming no intervening holidays. But if an *ex parte* presentation is made on the day the Sunshine notice is released, an *ex parte* notice must be submitted by the next business day—a shorter deadline that is necessary to afford all parties a sufficient opportunity to present their arguments within the compressed timeframe of the Sunshine period. Under these circumstances, any reply must be filed by the next business day following filing of the *ex parte* notice, and must be submitted in writing and limited to only the particular issues raised in the *ex parte* notice. Thus, if an *ex parte* presentation is made on a Tuesday and the Sunshine notice is also issued on that day, the *ex parte* notice must be filed no later than 11:59:59 p.m. on Wednesday, and any reply would need to be filed by 11:59:59 p.m. on Thursday, assuming no intervening holidays. Copies of any reply must be provided to each staff member or Commissioner who received the original presentation from the submitting party. Neither oral replies nor oral or written sur-replies are permitted in the absence of an express request by a Commissioner or staff.

When *ex parte* presentations are made during the limited Sunshine period, it is particularly important that the required notices be filed quickly and in an accessible electronic format. However, we find valid the concern about the difficulty of complying with a four-hour

filing deadline, especially in those not-infrequent cases in which a party makes several oral *ex parte* presentations in one day. We find that imposing a four-hour deadline on filings made after a series of meetings at different times during the same day could result in rushed, insufficient filings and unintentional noncompliance with the deadline. For this reason, we amend our rule to provide that permissible *ex parte* presentations made in permit-but-disclose proceedings during the Sunshine period (under an exception to the Sunshine period prohibition) must be summarized and placed in the record by the end of the same day (*i.e.*, by 11:59:59 p.m.) on which the presentation was made. This revised deadline is more easily applied than our four-hour proposal and should not materially affect the interests of due process and transparency. Consistent with this revised rule, we will allow parties to file written replies to *ex parte* presentations during the Sunshine period no later than the next business day following the presentation. These replies shall be limited to addressing the specific issues and information in the *ex parte* notice to which they are replying. Copies of any reply must be provided to each staff member or Commissioner who received the original presentation from the submitting party. Finally, as in the case of filings for presentations made on the day the Sunshine Notice is issued, neither oral replies nor oral or written sur-replies shall be permitted in the absence of an express request by staff.

Sanctions and Enforcement

In the *NPRM*, we stated our intent to place increased emphasis on enforcement addressing impermissible *ex parte* contacts, regardless of any rule amendments we might adopt in this Report and Order. We asked specifically what sanctions would be appropriate to address the filing of insufficient *ex parte* notices, and whether prejudice to other parties should be a principal factor in determining an appropriate sanction. We also sought comment on whether all sanctions for *ex parte* rule violations should be publicly announced. See 25 FCC Rcd at 2415.

In the Report and Order, we affirm the tentative conclusion in the *NPRM* that stricter enforcement of our *ex parte* rules complements the improvements to the rules described elsewhere in this summary and reinforces their purpose in making our proceedings more open and transparent to the public and fairer to interested parties. We further find that the revised enforcement program will be best implemented by close

coordination between the Office of General Counsel and the Enforcement Bureau. Accordingly, the Office of General Counsel will retain the authority it currently has under section 0.251(g), 47 CFR 0.251(g), to issue rulings on whether violations of the *ex parte* rules have occurred and to impose appropriate sanctions. We do, however, amend our rules to require that the General Counsel refer any case in which a forfeiture or a citation may be warranted to the Enforcement Bureau for disposition, and we delegate authority to the Enforcement Bureau to levy fines for violations of the *ex parte* rules. In the event the Enforcement Bureau ultimately determines that a forfeiture or a citation is not warranted, the General Counsel will take appropriate action on the matter. The Commission will also give public notice via the Internet of the filing and disposition of *ex parte* complaints.

We decline at this time to provide for the harsher sanction of routine disqualification. Although it would certainly deter parties from violating the rules, routinely barring parties from further participation in Commission proceedings diminishes their ability to influence action from the Commission that would serve the public interest, and it would lessen the pool of knowledge and information on which to base our decisions. However, we will monitor this new enforcement program to assure that it is effective in deterring future violations.

Other Issues

1. Other Agencies' Procedures

In the *NPRM*, we observed that other Federal agencies have *ex parte* rules and procedures that differ from our own, including the requirement that Commissioners and staff summarize and file oral *ex parte* communications rather than the parties making them. See 25 FCC Rcd at 2408–09. We asked whether any of these distinct approaches would be instructive in considering amendments to our own *ex parte* rules.

We see no clear advantage to the suggestion by one commenter that Commission staff prepare and file *ex parte* notices. Even if the Commission is unique in relying on outside parties to submit such notices, other agencies may be differently situated to the extent their docket is primarily adjudicatory rather than rulemaking (e.g., the Federal Trade Commission). Also, staff summaries raise an issue of fairness. The complex legal and technical nature of the issues sometimes presented *ex parte* make it preferable for the parties arguing those issues to summarize them. We also

question what procedures would be used in cases where the presenter believes a staff summary is incorrect or incomplete. Finally, the time staff would spend in writing summaries of *ex parte* presentations would take away from the time available to analyze the issues and assist the Commission in reaching its decisions. For these reasons, we focus primarily in the Report and Order on improving our own rules rather than on adopting the rules of other agencies.

As we stated previously, we amend our rules to clarify that copies of all electronically filed *ex parte* notices be sent electronically to staff and Commissioners who participated in the presentation. This will enhance the ability of decision-makers to review these notices expeditiously, detect any outstanding errors or omissions, and request that they be cured. Filers may be asked to submit any corrections or further information as necessary to comply with the *ex parte* rules. Where staff believes there are instances of substantial or repeated violations of the *ex parte* rules, staff should report such violations to the General Counsel.

2. New Media

Although we did not propose any rule amendments in the *NPRM* regarding the treatment of comments on various Commission new media sites, including the Commission's blogs, its Facebook page, its MySpace page, its IdeaScale pages, its Flickr page, its Twitter page, its RSS feeds, and its YouTube page, several commenters addressed this issue. As a general matter, the commenters addressing this issue acknowledged the value of new media as part of the Commission's public outreach efforts, but they expressed reservations about the use of this material in Commission proceedings.

In the Report and Order, we find that these comments illustrate the complications associated with increasing the accessibility of Commission decision-making via new media in proceedings governed by the Administrative Procedure Act. The Commission has incorporated some of this material into the record of some inquiries and other proceedings, and will continue to develop ways that will make its inclusion in more proceedings technically and practically possible. However, at this time, we agree that incorporating blog posts and other presentations via new media into the record of all rulemaking proceedings would be impractical. Therefore, as stated in the *NPRM*, we will continue to associate new media contacts in the records of specific proceedings, on the

terms announced for those particular proceedings. In addition, users of new media may file comments electronically in any permit-but-disclose proceeding consistent with the *ex parte* rules by clicking on the link to ECFSEXPRESS on the Commission's homepage: <http://www.fcc.gov>.

Minor and Conforming Amendments

The *NPRM* proposed a series of minor changes to the *ex parte* rules designed to update or clarify them. See 25 FCC Rcd at 2416–18. For the reasons stated in the *NPRM*, we adopt in the Report and Order the following minor amendments: (1) Section 1.1202(d)(6), 47 CFR 1.1202(d)(6), duplicates section 1.1202(d)(5) and is deleted; (2) section 1.1204(a)(6), 47 CFR 1.1204(a)(6), is amended to change the word "telecommunications" to "communications" and to delete the word "competition"; (3) section 1.1204(a)(12), 47 CFR 1.1204(a)(12), is amended to add the Pooling Administrator and the TRS Numbering Administrator to the list of entities with whom communications are exempt from the *ex parte* rules; (4) section 1.1206(a), 47 CFR 1.1206(a), is amended to delete from the list of permit-but-disclose proceedings Bell Operating Company applications under section 271 of the Act, because all Bell Operating Companies have applied for and received authority under section 271 in all their respective states; (5) section 1.1208, 47 CFR 1.1208, is amended to require the filing of a disclosure notice when parties in restricted proceedings make a permissible presentation on a non-*ex parte* basis (i.e., when other parties have been given advance notice and an opportunity to participate); (6) section 1.1206(b)(2), 47 CFR 1.1206(b)(2), is clarified to state expressly that documents shown or given to Commission staff during *ex parte* meetings are themselves written *ex parte* presentations and must be filed; (7) section 1.1206(b)(2), 47 CFR 1.1206(b)(2), is further amended by adding a sentence to note one to codify the practice whereby the staff at its discretion may file an *ex parte* summary of a multiparty meeting as an alternative to having each participant do so; (8) section 1.1203(a)(4), 47 CFR 1.1203(a)(4), is clarified to state that the requirement to disclose presentations made during the Sunshine period only applies to presentations made in permit-but-disclose proceedings; (9) section 1.1203, 47 CFR 1.1203, is clarified to state that the Sunshine period prohibition does not affect parties' obligation to file a written *ex parte* presentation or memorandum

summarizing an oral *ex parte* presentation made on the day before the Sunshine period begins, even though new *ex parte* presentations are not permitted during the Sunshine period unless they are made pursuant to an exception to the prohibition on *ex parte* contacts; and (10) section 1.1206, 47 CFR 1.1206, is non-substantively reorganized to make it clearer and easier to understand and to make various conforming edits.

Regulatory Flexibility Act. Our actions do not require notice and comment, and therefore fall outside the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 605(b), and require no initial or final regulatory flexibility analysis under Section 604 of that Act, 5 U.S.C. 604. We nevertheless note that we anticipate that the rules changes adopted in the Report and Order will not have a significant economic impact on a substantial number of small entities or impose significant costs on parties to Commission proceedings.

Paperwork Reduction Act of 1995 Analysis. This document contains new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this Report and Order as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, we have assessed the effects of the modified *ex parte* rules on small business concerns, and find that they will impose no significant added burden on businesses with fewer than 25 employees.

Congressional Review Act. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 1

Administrative practice and procedure, claims, Investigations, Lawyers, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 1 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Section 0.111 is amended by redesignating paragraphs (a)(15) through (23) as paragraphs (a)(16) through (24) and by adding new paragraph (a)(15) to read as follows:

§ 0.111 Functions of the Bureau.

(a) * * *

(15) Upon referral from the General Counsel pursuant to § 0.251(g), impose sanctions for violations of the Commission's *ex parte* rules including, but not limited to, the imposition of monetary forfeitures, consistent with § 0.311.

* * * * *

■ 3. Section 0.251 is amended by revising paragraph (g) to read as follows:

§ 0.251 Authority delegated.

* * * * *

(g) The General Counsel is delegated authority to issue rulings on whether violations of the *ex parte* rules have occurred and to impose appropriate sanctions. The General Counsel shall refer to the Enforcement Bureau for disposition pursuant to § 0.311(b) any matter in which a forfeiture or a citation under 47 U.S.C. 503(b)(5) may be warranted. If the Enforcement Bureau determines that forfeiture or a citation is not warranted, the matter shall be referred back to the General Counsel for appropriate action.

* * * * *

PART 1—PRACTICE AND PROCEDURE

■ 4. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

§ 1.1202 [Amended]

■ 5. In § 1.1202, remove paragraph (d)(6).

■ 6. Section 1.1203 is amended by revising paragraphs (a)(4) and (b)

introductory text, and adding paragraph (c), to read as follows:

§ 1.1203 Sunshine period prohibition.

(a) * * *

(4) The presentation is made by a member of Congress or his or her staff, or by other agencies or branches of the Federal government or their staffs in a proceeding exempt under § 1.1204 or subject to permit-but-disclose requirements under § 1.1206. Except as otherwise provided in § 1.1204(a)(6), if the presentation is of substantial significance and clearly intended to affect the ultimate decision, and is made in a permit-but-disclose proceeding, the presentation (or, if oral, a summary of the presentation) must be placed in the record of the proceeding by Commission staff or by the presenter in accordance with the procedures set forth in § 1.1206(b).

(b) The prohibition set forth in paragraph (a) of this section begins on the day (including business days and holidays) after the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

* * * * *

(c) The prohibition set forth in paragraph (a) of this section shall not apply to the filing of a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation made on the day before the Sunshine period begins, or a permitted reply thereto.

■ 7. Section 1.1204 is amended by revising paragraphs (a)(6) and (a)(12)(iv), and adding paragraphs (a)(12)(v) and (vi) to read as follows:

§ 1.1204 Exempt *ex parte* presentations and proceedings.

(a) * * *

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a communications matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or Joint board proceeding) *provided that*, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

* * * * *

(12) * * *

(iv) The Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C.

251(b)(2) and (e), provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding;

(v) The TRS Numbering Administrator relating to the administration of the TRS numbering directory pursuant to 47 U.S.C. 225 and 47 U.S.C. 251(e); or

(vi) The Pooling Administrator relating to the administration of thousands-block number pooling pursuant to 47 U.S.C. 251(e).

* * * * *

■ 8. Section 1.1206 is amended by revising paragraph (a)(12), removing paragraph (a)(13), and redesignating paragraph (a)(14) as (a)(13), and revising paragraph (b) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

(a) * * *

(12) A modification request filed pursuant to § 64.1001 of this chapter; and

* * * * *

(b) The following disclosure requirements apply to *ex parte* presentations in permit but disclose proceedings:

(1) *Oral presentations.* A person who makes an oral *ex parte* presentation subject to this section shall submit to the Commission's Secretary a memorandum that lists all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and summarizes all data presented and arguments made during the oral *ex parte* presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum.

Note to Paragraph (b)(1): Where, for example, presentations occur in the form of discussion at a widely attended meeting, preparation of a memorandum as specified in the rule might be cumbersome. Under these circumstances, the rule may be satisfied by submitting a transcript or recording of the discussion as an alternative to a memorandum. Likewise, Commission staff in

its discretion may file an *ex parte* summary of a multiparty meeting as an alternative to having each participant file a summary.

(2) *Written and oral presentations.* A written *ex parte* presentation and a memorandum summarizing an oral *ex parte* presentation (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an *ex parte* presentation. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and, accordingly, must be filed consistent with the provisions of this section. Consistent with the requirements of § 1.49 paragraphs (a) and (f), additional copies of all written *ex parte* presentations and notices of oral *ex parte* presentations, and any replies thereto, shall be mailed, e-mailed or transmitted by facsimile to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

(i) In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, shall, when feasible, be filed through the electronic comment filing system available for that proceeding, and shall be filed in a native format (e.g., .doc, .xml, .ppt, searchable .pdf). If electronic filing would present an undue hardship, the person filing must request an exemption from the electronic filing requirement, stating clearly the nature of the hardship, and submitting an original and one copy of the written *ex parte* presentation or memorandum summarizing an oral *ex parte* presentation to the Secretary, with a copy by mail or by electronic mail to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

(ii) *Confidential Information.* In cases where a filer believes that one or more of the documents or portions thereof to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be routinely made available for public inspection pursuant to § 0.459 of this chapter.

Accompanying any such request, the filer shall include in paper form a copy of the document(s) containing the confidential information, and also shall file electronically a copy of the same document(s) with the confidential information redacted. The redacted document shall be machine-readable whenever technically possible. Where

the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(iii) *Filing dates outside the Sunshine period.* Except as otherwise provided in paragraphs (b)(2)(iv) and (v) of this section, all written *ex parte* presentations and all summaries of oral *ex parte* presentations must be filed no later than two business days after the presentation. As set forth in § 1.4(e)(2), a "business day" shall not include a holiday (as defined in § 1.4(e)(1)). In addition, for purposes of computing time limits under the rules governing *ex parte* presentations, a "business day" shall include the full calendar day (i.e., from 12:00 a.m. Eastern Time until 11:59:59 p.m. Eastern Time).

Example: On Tuesday a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. The second business day following the *ex parte* presentation is the following Thursday (absent an intervening holiday). The presenting party must file its *ex parte* notice before the end of the day (11:59:59 p.m.) on Thursday. Similarly, if an *ex parte* presentation is made on Friday, the second business day ordinarily would be the following Tuesday, and the *ex parte* notice must be filed no later than 11:59:59 p.m. on that Tuesday.

(iv) *Filing dates for presentations made on the day that the Sunshine notice is released.* For presentations made on the day the Sunshine notice is released, any written *ex parte* presentation or memorandum summarizing an oral *ex parte* presentation required pursuant to § 1.1206 or § 1.1208 must be submitted no later than the end of the next business day. Written replies, if any, shall be filed no later than two business days following the presentation, and shall be limited in scope to the specific issues and information presented in the *ex parte* filing to which they respond.

Example: On Tuesday, a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Wednesday. A reply would be due by the end of the day (11:59:59 p.m.) on Thursday.

(v) *Filing dates during the Sunshine Period.* If an *ex parte* presentation is made pursuant to an exception to the Sunshine period prohibition, the written *ex parte* presentation or

memorandum summarizing an oral *ex parte* presentation required under this paragraph shall be submitted by the end of the same business day on which the *ex parte* presentation was made. The memorandum shall identify plainly on the first page the specific exemption in § 1.1203(a) on which the presenter relies, and shall also state the date and time at which any oral *ex parte* presentation was made. Written replies to permissible *ex parte* presentations made pursuant to an exception to the Sunshine period prohibition, if any, shall be filed no later than the next business day following the presentation, and shall be limited in scope to the specific issues and information presented in the *ex parte* filing to which they respond.

Example: On Tuesday, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting, which triggers the beginning of the Sunshine period on Wednesday. On Thursday, a party makes an *ex parte* presentation to a Commissioner on a proceeding that appears on the Sunshine Agenda. That party must file an *ex parte* notice by the end of the day (11:59:59 p.m.) on Thursday. A reply would be due by the end of the day (11:59:59 p.m.) on Friday.

(vi) If a notice of an oral *ex parte* presentation is incomplete or inaccurate, staff may request the filer to correct any inaccuracies or missing information. Failure by the filer to file a corrected memorandum in a timely fashion as set forth in paragraph (b) of this section, or any other evidence of substantial or repeated violations of the rules on *ex parte* contacts, should be reported to the General Counsel.

(3) Notwithstanding paragraphs (b)(1) and (2) of this section, permit-but-disclose proceedings involving presentations made by members of Congress or their staffs or by an agency or branch of the Federal Government or its staff shall be treated as *ex parte* presentations only if the presentations are of substantial significance and clearly intended to affect the ultimate decision. The Commission staff shall prepare written summaries of any such oral presentations and place them in the record in accordance with paragraph (b) of this section and also place any written presentations in the record in accordance with that paragraph.

(4) *Notice of ex parte presentations.* The Commission's Secretary shall issue a public notice listing any written *ex parte* presentations or written summaries of oral *ex parte* presentations received by his or her office relating to any permit-but-disclose proceeding. Such public notices generally should be released at least twice per week.

Note to Paragraph (b): Interested persons should be aware that some *ex parte* filings, for example, those not filed in accordance with the requirements of this paragraph (b), might not be placed on the referenced public notice. All *ex parte* presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.

■ 9. Section 1.1208 is amended by revising the introductory text to read as follows:

§ 1.1208 Restricted proceedings.

Unless otherwise provided by the Commission or its staff pursuant to § 1.1200(a) *ex parte* presentations (other than *ex parte* presentations exempt under § 1.1204(a)) to or from Commission decision-making personnel are prohibited in all proceedings not listed as exempt in § 1.1204(b) or permit-but-disclose in § 1.1206(a) until the proceeding is no longer subject to administrative reconsideration or review or judicial review. Proceedings in which *ex parte* presentations are prohibited, referred to as "restricted" proceedings, include, but are not limited to, all proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings). A party making a written or oral presentation in a restricted proceeding, on a non-*ex parte* basis, must file a copy of the presentation or, for an oral presentation, a summary of the presentation in the record of the proceeding using procedures consistent with those specified in § 1.1206.

* * * * *

■ 10. Section 1.1216 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 1.1216 Sanctions.

(a) *Parties.* Upon notice and hearing, any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to report the facts and circumstances concerning any such violation as required by this subpart, may be subject to sanctions as provided in paragraph (d) of this section, or disqualified from further participation in that proceeding. In proceedings other than a rulemaking, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding

should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate may also be imposed.

* * * * *

(d) *Penalties.* A party who has violated or caused the violation of any provision of this subpart may be subject to admonishment, monetary forfeiture, or to having his or her claim or interest in the proceeding dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate also may be imposed. Upon referral from the General Counsel following a finding of an *ex parte* violation pursuant to § 0.251(g) of this chapter, the Enforcement Bureau shall have delegated authority to impose sanctions in such matters pursuant to § 0.111(a)(15) of this chapter.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[GC Docket No. 10-44; FCC 11-16]

Commission's Rules of Practice, Procedure, and Organization

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission revises certain procedural and organizational rules. The rule revisions fall into three general categories. First, the Commission adopts several docket management measures, such as broadening the use of docketed proceedings; expanding the requirement for electronic filing (and reducing the scope of the obligation to file paper copies); and permitting staff in certain circumstances to notify parties electronically of docket filings and to close inactive dockets. Second, the Commission revises rules regarding the reconsideration of agency decisions, delegating authority to the staff to dismiss or deny defective or repetitive petitions for reconsideration of Commission decisions, and amending the rule that authorizes the Commission to reconsider a decision on its own motion within 30 days to make clear that the Commission may modify a decision (not merely set it aside or vacate it). Finally, the Commission implements changes to miscellaneous regulations. In order to make its